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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

No. 621

MORRISON T. WADE and
BESSIE LOU TANNER WADE, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On application for writ of certiorari to the Supreme Court of the State of Michigan.

BRIEF OPPOSING PETITION FOR CERTIORARI

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Index to subject-matter

		Page
I	Opinion of the court below	1
II	Counter-Statement of jurisdiction	2
III	Counter-statement of the case	3
IV	Reasons for opposing certiorari	8
V	Conclusion	9

Table of cases cited

Hailey v. Saginaw Justice of the Peace, 320 Mich. 59 4

Hudson v. Superior Court Judge, 42 Mich. 239 4

Ohio v. Akron Park District, 281 U.S. 74, 80 2

Port Huron Huron Bank v. Judge, 147 Mich. 551 4

Speed v. Common Council, 98 Mich. 360 4

Wade v. Michigan, 336 U.S. 924, 947 2

Warnshuis v. State Board, 285 Mich. 699 4

Statutes and court rules cited

28 USC §1257 (3) 2

Michigan "One-Man Grand Jury Law" 2, 6

as amended, Act No. 311, 1949 6

Michigan Judicature Act, on Writs of Prohibition, chap. 36 § 10, Mich. Comp. Laws, 1948, § 636.10, et seq., Stat. Ann. [Henderson] § 27.2237 et seq. 3, 4

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I

Opinion of the Court Below[*]

In denying petitioner's application for writ of prohibition, the court below expressed no opinion.

[*]
Numbers in parentheses, unless otherwise plainly indicated, refer to pages of the typewritten transcript of record.

II

Counter-Statement of Jurisdiction.

It would appear that petitioners invoke the jurisdiction of this Court under § 1257 (3), Title 28, U.S.C. as revised in 1948, which so far as pertinent provides that "final judgments * * * rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court: * * * (3) by certiorari * * * where the validity of a state statute is drawn in question on the gruond of its being repugnant to the Constitution * * * of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution * * * of the United States."

Once again, as in a former proceeding, No. 453, October Term 1948, [1] counsel contends that Michigan's "One-Man Grand Jury Law", so-called,[2] violates the constitutional guarantee of a republican form of government,[3] and it deprives petitioners of freedom without due process of law (Fourteenth Amendment).

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[1]

Certiorari denied, 336 U.S. 924, to review conviction for contempt of court in "one-man grand jury proceedings"; rehearing denied, 336 U.S. 947.

[2]

Mich. Code of Criminal Procedure, Chap. 7, § § 3, 4, Mich. Comp. Laws 1948, § § 767.3, 767.4, Mich. Stat. Ann. [Henderson] § § 28.943, 28.944 (the latter as amended).

[3]

This guarantee, of course, is to "every State in this Union", and it is well settled that questions arising therefrom are political—for Congress and not for the courts. Ohio v. Akron Park District, 281 U.S. 74, 80, and cases cited.

We respectfully suggest that in the court below validity of the statute aforesaid was not clearly and unmistakably drawn in question by petitioners,[4] that no federal question was decided, and that no right, title, privilege or immunity was *specially* set up or claimed under the Constitution of the United States, and if so claimed or set up such a challenge possesses no substantial merit. All of which appears, we think, from the statement and argument that follow.

III

Counter-Statement of the Case.

We respectfully note the following inaccuracies and insufficiencies in petitioners' statement, *esp.* concerning the gist of their petition (2) for writ of prohibition addressed to the Michigan Supreme Court, the questions raised therein, and the nature of the remedy thus sought.

1. Under Michigan's Judicature Act, Chap. 36, § 10,[5] writs of prohibition

> "shall be issued only out of the supreme court; and such writs shall be applied for upon affidavits, by petition, in the same manner as writs of mandamus; and if the cause shown shall appear to the court to be sufficient, a writ shall be thereupon issued, which shall

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[4]
We fail to find such a clear statement in the petition for writ of prohibition (2-10), though it would appear that the question was raised on motion to dismiss (23-29) filed and denied by the trial court.

[5]
Mich. Comp. Laws 1948, § 636.10, Stat. Ann. [Henderson] § 27.2237.

command the court and the party to whom it shall be directed, to desist and refrain from any further proceedings in the suit or matter specified therein until the next term of the said supreme court, and the further order of such court thereon; and then to show cause why they should not be absolutely restrained from any further proceedings in such suit or matter".[6]

Sections 11-15 of the same chapter,[7] map procedural steps commencing with service and return of the first [preliminary] writ which performs the function of an order to show cause, and ending with final judgment on the merits, § § 14-15, *supra*, either for prohibition absolute or dismissal of the petition.[8]

2. The petitioners, defendants in a criminal cause pending in the recorders court of the city of Detroit, filed with the clerk of the Michigan Supreme Court their petition (2-12) praying (11) for a writ of prohibition directed to

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[6]

Under Michigan decisions, such a writ is a common-law preventive against the encroachment, excess or improper assumption of jurisdiction, is discretionary, and cannot be issued to restrain any action of an inferior court which can be reviewed by the ordinary means. Hudson v. Detroit Superior Court Judge, 42 Mich. 239; Speed v. Common Council, 98 Mich. 360; Port Huron Bank v. Judge, 147 Mich. 551; Hailey v. Saginaw Justice of the Peace, 320 Mich. 59. And see Warnshuis v. State Board, 285 Mich. 699.

[7]

Mich. Comp. Laws 1948, § § 636.11-636.15, Stat. Ann. [Henderson] § § 27.2238-27.2242.

[8]

Thus it appears that grant of the first writ of prohibition is merely the initial step toward final judgment.

the judges of the recorder's court of the city of Detroit requiring them

> "to desist and refrain from any proceedings in the suits [criminal prosecutions] hereinabove described until the next term of the Supreme Court or until the further order of the Court, in pursuance of the statute in such case made and provided".

It appears therefrom that when filed, the petitioners were defendants in two causes pending in the recorder's court on what they allege to be "a so-called process of arrest" issued by the Honorable Gerald W. Groat, a judge of that court.

It is alleged that the [preliminary] examination in the first case was started in August 1948 and ended in January 1949. The information was filed in April, and the defendants filed three motions, to dismiss, to grant change of venue, and to furnish them a bill of particulars. The motion to dismiss was denied.

Such motion to dismiss, it is alleged (3-4), contain, among other reasons, certain substantial jurisdictional and constitutional questions, among which are as follows:

> "Because the so-called process is not entitled in any court or cause, contrary to Section 22, Article VII of the Constitution of the State of Michigan of 1908, and Sections 27.732 and 27.3471 of the State Statutes Annotated."

> "Because the so-called process upon which the defendants were arrested is neither a warrant nor an indictment, and is contrary to the law of the State of Michigan in such case made and provided".

> "Because the so-called process is so vague and indefinite and so general in its terms that the defendants have not been informed of the nature of the accusations against them, in violation of Section 19, Article II of the Constitution of the State of Michigan of 1908".[9]

It is further averred (4) that "the said jurisdictional and constitutional questions still remain undecided by the lower court".

And the petition for writ of prohibiton then sets forth in detail certain further proceedings held in the trial court on the motions aforesaid.

It is said (5) that the so-called one-man grand jury law of Michigan, having "been repealed by Act 311 of the Public Acts of 1949", which substituted a three-man judge grand jury, there is no jurisdiction to proceed further in the cause; and it is alleged (7) that the presiding judge of the recorder's court declined to continue the cause and ordered the petitioners to go to trial.

There are further allegations in the petition (7-9) which might induce the court in its discretion to grant the writ, *e.g.*, that on preliminary examination, almost 300 witnesses were sworn, that trial would consume 6 months to 1 year, that 500 to 1000 witnesses might be called, that their chief counsel was recovering from an attack of nervous exhaustion, and his services were indispensable, while through-

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[9]

So far at least there is nothing in these allegations to indicate an attack on the statute upon federal grounds.

out the petition we find the underlying complaint that the judges of the trial court refused and neglected to decide the questions involved. Then they aver (9):

> "Petitioners further show that they are entitled to a fair, full and complete determination of the issues that have been raised in the motion to dismiss, motion for change of venue and motion for bill of particulars; that the failure of the judges of the recorder's court of the city of Detroit to pass upon these questions amounts to a violation of petitioners' constitutional rights, their right to the equal protection of the laws and due process of law, as guaranteed to them under Section 1 of Article XIV of the Amendments to the Constitution of the United States".

And, finally, we note the following allegation on page 4 of the petition for certiorari:

> "While these jurisdictional questions in the instant case have been raised in various motions to dismiss, they have not been passed upon by the Courts, including the Michigan Supreme Court, before whom these matters have been raised".

The State filed an answer (39) and on the 16th day of February 1950, the Michigan Supreme Court entered an order (52) denying the petitioners' application for writ of prohibition.

IV

Reasons for opposing certiorari

We respectfully submit the following reasons for denying the writ of certiorari in this cause:

1. Although the question might have been discussed by counsel for petitioners in his brief filed in the court below to support the application for writ of prohibition, the petition itself did not draw in question the validity of the Michigan statute.

2. The vast majority of questions presented to the Michigan Supreme Court in the petition for prohibition, were non-federal in character, requiring the construction and application of the law of that state.

3. The Supreme Court of Michigan did not necessarily decide a federal constitutional question of importance.

4. All questions raised in the petition for prohibition could be saved for review in the event of conviction.

5. This is the second time that the petitioner Morrison T. Wade has attempted through application to this Court for certiorari to delay prosecution of the criminal proceedings in the trial court.

6. The Supreme Court of Michigan acted within sound legal discretion when it denied the writ of prohibition without comment and without deciding federal questions.

V

Conclusion.

We therefore respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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